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Reconsidering the Standard for Enhanced Damages in Patent Cases in View of Recent Guidance from the Supreme Court

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RECONSIDERING THE STANDARD FOR ENHANCED DAMAGES IN PATENT CASES IN VIEW OF RECENT GUIDANCE FROM THE SUPREME COURT

Howard Wisnia[†] & Thomas Jackman^{††}

This article examines whether the jurisprudence of the enhanced damages provision found in 35 U.S.C. § 284 should be modified in light of recent Supreme Court decisions that have altered the jurisprudence of the attorney's fees provision found in 35 U.S.C. § 285. The authors conclude that a revision is needed to the standard for determining whether to award enhanced damages under § 284 and that juries as opposed to judges should determine whether to grant such an award as well as the amount of the award.

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INTRODUCTION

The Supreme Court’s recent decisions in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*¹ and *Highmark Inc. v. Allcare Health Management Systems, Inc.*² significantly modified the jurisprudence for determining whether a patent lawsuit is “exceptional,” thus qualifying the prevailing party for attorney’s fees under § 285 of the Patent Act.³ These two decisions addressed the Federal Circuit’s multi-year jurisprudence on the appropriate standard of proof⁴ for

1. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014).
2. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744 (2014).
3. 35 U.S.C. § 285 (2013) (“The court in exceptional cases may award reasonable attorney fees to the prevailing party.”).
4. *Microsoft Corp. v. i4i Ltd. P’ship*, 131 S. Ct. 2238, 2245 n.4 (2011) (discussing how the term “burden of proof” has been used synonymously with “standard of proof,” but that the

exceptional-case determinations under § 285 and their proper characterization as either a question of fact or law. In discussing § 285, the Supreme Court did not mention § 284, the damages provision of the Patent Act that provides for the recovery of “damages adequate to compensate for the infringement”⁵ and increased damages for willful infringement.⁶ Courts have historically treated the discretionary-damage awards of § 284 and § 285 similarly, often citing precedent concerning one section in the application of the other.⁷ The reasoning in *Octane Fitness* and *Highmark* suggests that current Federal Circuit § 284 jurisprudence should be modified.⁸ Specifically, willfulness need only be proven by a preponderance of the evidence (as opposed to clear and convincing evidence), and is a question of fact entirely for the jury. This article also concludes that there is a Seventh Amendment right to have the jury perform the discretionary adjustment of damages under § 284. Finally, this article considers the implications of these modifications to § 284 jurisprudence.

I. THE SUPREME COURT MODIFIES THE JURISPRUDENCE OF 35 U.S.C. § 285

A. *Octane Fitness*

In *Octane*, the Supreme Court revised the application of 35 U.S.C. § 285, a fee-shifting provision for patent litigation to be applied in “exceptional” cases.⁹ The parties in *Octane* were manufacturers of exercise equipment.¹⁰ ICON sued Octane for patent infringement, but lost on summary judgment for non-infringement.¹¹ Octane then moved

Supreme Court uses “standard of proof” to specify “how difficult it will be for the party bearing the burden of persuasion to convince the jury of the facts in its favor”).

5. 35 U.S.C. § 284 (2013).

6. See *In re Seagate Tech., LLC*, 497 F.3d 1360, 1368 (Fed. Cir. 2007) (“Absent a statutory guide, we have held that an award of enhanced damages requires a showing of willful infringement.”).

7. See, e.g., *iLOR, LLC v. Google, Inc.*, 631 F.3d 1372, 1377 (Fed. Cir. 2011) (“[T]he objective baselessness standard for enhanced damages and attorneys’ fees against a non-prevailing plaintiff . . . is identical to the objective recklessness standard for enhanced damages and attorneys’ fees against an accused infringer for § 284 willful infringement actions.”); *Bard Peripheral Vascular, Inc. v. W.L. Gore & Assocs., Inc.*, 682 F.3d 1003, 1007 (Fed. Cir. 2012) (same).

8. A concurring opinion in a post-*Octane Fitness/Highmark* Federal Circuit decision on willfulness agrees that § 284 jurisprudence requires further review in light of the Supreme Court’s changes to § 285 jurisprudence. See *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 769 F.3d 1371, 1384 (Fed. Cir. 2014) (O’Malley, J., concurring).

9. 134 S. Ct. 1749, 1756 (2014); 35 U.S.C. § 285 (2013).

10. 134 S. Ct. at 1754.

11. *Id.* at 1755.

for attorney's fees under § 285, but the district court, applying existing Federal Circuit jurisprudence, declined to award fees because ICON's claim was not "objectively baseless" or "brought in subjective bad faith."¹² The Federal Circuit affirmed and declined to "revisit the settled standard for exceptionality."¹³

The Supreme Court reversed the Federal Court's decision, finding that the "objectively baseless" and "brought in subjective bad faith" requirements were inconsistent with the statute.¹⁴ The Supreme Court also suggested that preponderance of the evidence, not clear and convincing evidence," was the proper standard of proof under § 285.¹⁵ It explained that the "simple discretionary inquiry" required by § 285 did not impose "a specific evidentiary burden, much less such a high one."¹⁶ The Supreme Court noted that "patent-infringement litigation has always been governed by a preponderance of the evidence," as this standard "allows both parties to share the risk of error in roughly equal fashion."¹⁷ Significantly, the Supreme Court found that the analytical framework of *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc. (PRE)*, which was the foundation of the Federal Circuit's construction of § 285, had "no roots in the text of § 285."¹⁸ Important to our inquiry, the Federal Circuit had also been relying on *PRE* in its § 284 analysis,¹⁹ despite the fact that *PRE* deals with the "sham" exception to the doctrine of antitrust immunity for petitioning the government and the Supreme court has now suggested it is not relevant to patent law.²⁰

B. Highmark

In *Highmark Inc. v. Allcare Health Management System, Inc.*,²¹ released the same day as *Octane*, the Supreme Court found that the Federal Circuit had applied the wrong standard of review to the district

12. *Id.*

13. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 496 F. App'x 57, 65 (Fed. Cir. 2012).

14. *Octane Fitness*, 134 S. Ct. at 1756–57.

15. *Id.* at 1758.

16. *Id.*

17. *Id.* (citations omitted).

18. *Id.* at 1757 (discussing *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993)).

19. *See, e.g., Bard Peripheral Vascular, Inc. v. W.L. Gore & Assocs.*, 682 F.3d 1003, 1007 (Fed. Cir. 2012) (citing *PRE* as support for its holding with respect to § 284); *PRE*, 508 U.S. at 49–50.

20. *Octane Fitness*, 134 S. Ct. at 1757.

21. *Id.* at 1744 (2014).

court's § 285 findings.²² The accused infringer, Highmark, had moved for attorney's fees under § 285 after prevailing on its motion for summary judgment for non-infringement.²³ The district court granted the motion for attorney's fees, but the Federal Circuit reversed, applying *de novo* review to the district court's findings.²⁴ The Supreme Court found that the proper standard of review was abuse of discretion because, "[a]lthough questions of law may in some cases be relevant to the § 285 inquiry, that inquiry general is, at heart, rooted in factual determinations."²⁵

The Supreme Court's analysis of § 285 suggests that the Federal Circuit has applied the wrong standard of proof under 35 U.S.C. § 284. These decisions also suggest that the recent shift by the Federal Circuit to treat willfulness determinations as a matter of law is incorrect.²⁶

This article examines the history of treble damages for patent infringement in the U.S., attempts to locate the source of the clear-and-convincing standard required by current Federal Circuit jurisprudence for obtaining these damages, and explores the jurisprudence behind similar willfulness provisions to see if clear and convincing evidence is the appropriate standard of proof for awarding enhanced damages. This article also examines the propriety of the Federal Circuit's recent treatment of willfulness as a question of law instead of a question of fact.

II. THE HISTORY OF ENHANCED DAMAGES IN PATENT CASES

Enhanced damages for patent infringement dates back to 1793 in the U.S., just three years after the first session of the U.S. Congress passed the Patent Act of 1790.²⁷ The Patent Act of 1793 set infringement damages as "a sum, that shall be at least equal to three times the price, for which the patentee has usually sold or licensed to

22. *Id.* at 1749.

23. *Id.* at 1747.

24. *Id.*

25. *Id.* at 1749 (citations omitted).

26. *See, e.g.,* *Bard Peripheral Vascular, Inc. v. W.L. Gore & Assocs.*, 682 F.3d 1003, 1006–07 (Fed. Cir. 2012) (holding that a proper willfulness determination is at least partially a matter of law, with the court acting as a gatekeeper for the issue); *see also* *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 769 F.3d 1371, 1384–86 (Fed. Cir. 2014) (O'Malley, J., concurring and observing that the jurisprudence of § 284 is potentially in need of reform). As discussed below, Judge O'Malley's suggestion that enhanced damages should be a matter entirely for the judge may be inconsistent with the Seventh Amendment. *See infra* Part IV(A).

27. Patent Act of 1793, ch. 11, 1 Stat. 318 (1793) (current version at 35 U.S.C. § 284 (2013)); Patent Act of 1790, ch. 7, 1 Stat. 109 (1790).

other persons, the use of the said invention.”²⁸ This mandatory trebling remained largely unaltered until the Patent Act of 1836, which provided that once a patentee obtained a favorable verdict, “it shall be in the power of the court to render judgment for any sum above the amount found by such verdict as the actual damages sustained by the plaintiff, not exceeding three times the amount thereof.”²⁹ The provision for discretionary enhanced damages has remained part of the Patent Act ever since.³⁰ The current provision provides that once a patentee has obtained a finding of infringement, the court may “increase the damages up to three times the amount found or assessed.”³¹

III. THE HISTORY BEHIND THE CLEAR AND CONVINCING EVIDENCE STANDARD OF PROOF FOR WILLFULNESS DETERMINATIONS

A. *The Federal Circuit Era*

The history of requiring clear and convincing evidence of willful infringement to obtain enhanced damages under § 284 is not nearly as straightforward as the history of § 284 itself. Nothing in 35 U.S.C. § 284 or its predecessors mentions a particular standard of proof. Yet the Federal Circuit has required clear and convincing evidence of willful infringement for enhanced damages under § 284 for almost 30 years.³²

Shatterproof Glass Corp. v. Libbey-Owens Ford Co., decided in 1985, three years after the Federal Circuit was established, is the genesis of this requirement in the Federal Circuit.³³ The court stated that “[t]he jurisprudence . . . uniformly requires clear and convincing evidence in support of increased damages.”³⁴ Yet, the *Shatterproof* court cited no support for its holding. Nonetheless, future Federal Circuit decisions on the issue all cite backwards in a chain to *Shatterproof*.³⁵

28. Patent Act of 1793 § 5, 1 Stat. at 322.

29. Patent Act of 1836, ch. 357, § 14, 5 Stat. 117, 123 (current version at 35 U.S.C. § 284 (2013)).

30. This provision was last modified by the Patent Act of 1952, Pub. L. No. 82-593, § 284, 66 Stat. 792, 813 (codified at 35 U.S.C. § 284).

31. 35 U.S.C. § 284 (2013).

32. See, e.g., *Shatterproof Glass Corp. v. Libbey-Owens Ford Co.*, 758 F.2d 613, 628 (Fed. Cir. 1985); *In re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (en banc); *Bard Peripheral Vascular, Inc. v. W.L. Gore & Assocs., Inc.*, 682 F.3d 1003, 1005 (Fed. Cir. 2012).

33. See *id.*

34. *Id.*

35. See, e.g., *Johns Hopkins Univ. v. CellPro, Inc.*, 152 F.3d 1342, 1363–64 (Fed. Cir. 1998) (citing *SRI Int’l, Inc. v. Advanced Tech. Labs., Inc.*, 127 F.3d 1462, 1465 (Fed. Cir. 1997), *Pall*

The exception is *Orthokinetics, Inc. v. Safety Travel Chairs, Inc.*, decided in 1986, one year after *Shatterproof*.³⁶ The parties had submitted jointly prepared questions to the jury in the district court, which the Federal Circuit held “recognized the appropriate burdens to be met by each of the parties as well as the corresponding standard of proof with respect to each issue.”³⁷ One of these questions stated that the standard of proof for willful infringement was the preponderance of the evidence.³⁸ The significance of this holding was quickly diminished by *E.I. du Pont de Nemours & Co. v. Phillips Petroleum Co.*, decided in 1988, in which the court “conclude[d] that *Orthokinetics* never intended to change the proper test stated in *Shatterproof*.”³⁹ Nonetheless, it suggests that not all judges initially agreed (or assumed) that clear and convincing was the appropriate standard.

B. The Pre-Federal Circuit Era

In searching for the uniform jurisprudence of *Shatterproof*, a review of the preceding two-hundred years of patent cases revealed that courts have historically found evidence of willful infringement to be either sufficient or insufficient without explaining the specific evidentiary standard of proof it applied.⁴⁰ By the mid-20th century, courts began discussing which party bore the burden of proof (i.e., that the burden was on the patentee to show willful infringement), but had not yet addressed the evidentiary standard.⁴¹

Corp. v. Micron Separations, Inc., 66 F.3d 1211, 1221 (Fed. Cir. 1995), *E.I. du Pont de Nemours & Co. v. Phillips Petroleum Co.*, 849 F.2d 1430, 1440 (Fed. Cir. 1988), *Shatterproof*, 758 F.2d at 628).

36. *Orthokinetics, Inc. v. Safety Travel Chairs, Inc.*, 806 F.2d 1565 (Fed. Cir. 1986).

37. *Id.* at 1569.

38. *Id.* at 1583.

39. 849 F.2d 1430, 1440 (Fed. Cir. 1988).

40. *See, e.g.*, *Allen v. Deacon*, 21 F. 122, 123 (C.C.D. Cal. 1884) (“I do not think the infringement after notice in question is of such a willful nature as to incur the penalty of a recovery for all prior infringements without notice of the patent.”); *Boesch v. Graff*, 133 U.S. 697, 704 (1890) (stating, without discussing the appropriate standard of proof, that “[i]t is conceded that these exceptions raise two points, namely, that the infringement was not willful [sic].”); *Lowell Mfg. Co. v. Hogg*, 70 F. 787, 787 (C.C.D. Mass. 1895) (holding, without a discussion of the standard of proof, that “under the circumstances of the case, we are not satisfied that his infringements were willful.”); *Phila. Rubber Works Co. v. U.S. Rubber Reclaiming Works*, 276 F. 600, 609 (D.N.Y. 1920) (holding, without stating the standard of proof, that “I am unable to sustain plaintiff’s claim the infringement in question was wanton and willful.”); *Muther v. United Shoe Mach. Co.*, 21 F.2d 773, 780 (D. Mass. 1927) (holding, without stating the standard of proof, that “[t]he infringement was willful, deliberate, and intentional, and a case seems to be presented for the exercise of the discretionary power of the court to increase plaintiff’s legal damages.”).

41. *See, e.g.*, *Artmoore Co. v. Dayless Mfg. Co.*, 208 F.2d 1, 5 (7th Cir. 1953).

In its 1982 decision *Novo Industri A/S v. Travenol Lab.*,⁴² the Seventh Circuit lumped § 285 and § 284 together and stated, “such awards are not to be given to a prevailing party as a matter of course but only upon an ‘unambiguous showing of extraordinary misconduct.’”⁴³ This holding implies a higher evidentiary standard than preponderance of the evidence.

The *Novo* court cited a 1972 Seventh Circuit opinion, *Airtex Corp. v. Shelley Radiant Ceiling Co.*, to support its holding.⁴⁴ However, the *Airtex* case concerned a request for attorney fees under § 285, not enhanced damages under § 284.⁴⁵ The *Airtex* court relied on a line of cases⁴⁶ that all converged on the idea that since fraud must be proven by clear and convincing evidence, it is also the correct standard for obtaining attorney’s fees because the request is often supported by allegations of fraud.⁴⁷ *Airtex* agreed with this reasoning despite acknowledging that the “exceptional case” justification under § 285 is not limited to fraud.⁴⁸

A close look at the first case in this line, *Armour & Co. v. Wilson & Co.*,⁴⁹ reveals that the later cases interpreted it incorrectly. *Armour* examined whether an award of attorney fees was appropriate in the context of accusations of inequitable conduct and fraud by the patentee.⁵⁰ The court in *Armour* first overturned findings related to fraud, concluding that the evidence put forth failed to meet the “clear and convincing evidence” standard.⁵¹ The court then overturned the district court’s award of fees because “the basis of this award was not clearly stated” as required and that in any event there was “no proper basis for an award of attorney fees in this case.”⁵² It never mentioned the appropriate standard of proof required to obtain attorney fees under § 285.

42. 677 F.2d 1202 (7th Cir. 1982).

43. *Novo Industri*, 677 F.2d at 1211 (emphasis added) (quoting *Airtex Corp. v. Shelley Radiant Ceiling Co.*, 536 F.2d 145, 155 (7th Cir. 1976)).

44. *Id.*

45. *Airtex*, 536 F.2d at 155.

46. *Id.* (citing *Technograph Printed Circuits, Ltd. v. Methode Elecs., Inc.*, 484 F.2d 905, 909 (7th Cir. 1973) (citing *Sarkes Tarizan, Inc. v. Philco Corp.*, 351 F.2d 557, 560 (7th Cir. 1965) (citing *Armour & Co. v. Wilson & Co., Inc.*, 274 F.2d 143, 148 (7th Cir. 1960))).

47. *Id.*

48. *Id.*

49. 274 F.2d 143 (7th Cir. 1960).

50. *Armour*, 274 F.2d at 148.

51. *Id.*

52. *Id.*

While *Armour* held that fraud and inequitable conduct must be shown by clear and convincing evidence,⁵³ it lends no support for the proposition that fee awards under § 285, much less treble damages under § 284, require clear and convincing evidence. The cases that followed *Armour* were wrong for citing it for such a proposition. *Novo* compounded the error by citing *Airtex* as a basis that both § 284 and § 285 require a higher standard of proof.⁵⁴

C. The Federal Circuit Likely Adopted an Incorrect Standard of Proof

It is one thing to require a party to show egregious or malicious behavior meriting fees or treble damages. It is quite another to require that this egregious behavior be proven by clear and convincing evidence as opposed to the preponderance of the evidence. The first requirement ensures consideration of the kinds of improper behavior envisioned by the statute. The second requirement deals with the risk of error, which is an entirely different issue. The Supreme Court reiterated in *Octane* that preponderance of the evidence is the appropriate standard of proof in patent litigation because the risk of error under § 285 should be shared equally between the plaintiff and the defendant.⁵⁵ Section 284 should be treated the same in this respect. This is further supported by a review of analogous provisions, which show that the law expects parties to share the risks of litigating willfulness.

D. The Standard of Proof for Willfulness in Other Contexts is Preponderance of the Evidence

Federal trademark law provides for the recovery of attorney's fees, increased damages, and the defendant's profits for willful infringement.⁵⁶ In *Fishman Transducers, Inc. v. Paul*, the First Circuit addressed the issue of whether willfulness should be proven by a preponderance of the evidence or by clear and convincing evidence.⁵⁷ The court noted that "authority in other circuits is divided on whether in Lanham Act cases to equate fraud or willfulness with a heightened

53. *Id.*

54. *Novo Industri A/S v. Travenol Labs., Inc.*, 677 F.2d 1202, 1211 (7th Cir. 1982) (citing *Airtex Corp. v. Shelley Radiant Ceiling Co.*, 536 F.2d 145, 155 (7th Cir. 1976)).

55. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1758 (2014).

56. 15 U.S.C. § 1117 (2013).

57. 684 F.3d 187, 190–93 (1st Cir. 2012).

standard of proof”⁵⁸ and concluded that preponderance of the evidence was the proper standard.⁵⁹ The *Fishman* court reasoned that “the ordinary rule in civil cases is proof by a preponderance of the evidence” where “the text of [the statute] does not prescribe a different burden of proof.”⁶⁰ The court noted that even though fraud was “a cousin to willfulness” and was historically shown by clear and convincing evidence, “the modern tendency in the Supreme Court is to reserve the clear and convincing burden, unless dictated by statute, for matters with constitutional implications like civil commitment.”⁶¹ Citing various Supreme Court decisions for support, the *Fishman* court observed that preponderance of the evidence was the appropriate standard for the “imposition of even *severe* civil sanctions.”⁶²

Copyright law also provides for increased damages for willful infringement.⁶³ As with trademark infringement, courts only require a preponderance of the evidence to establish that infringement was willful.⁶⁴ Various courts have found willfulness provisions elsewhere to require only a preponderance of the evidence, including willful and malicious injury caused to a debtor,⁶⁵ willful misappropriation of trade secrets,⁶⁶ willful violation of the EPA,⁶⁷ willful violation of the Fair Labor Standards Act,⁶⁸ and willful discrimination.⁶⁹

58. *Id.* at 193.

59. *Id.*

60. *Id.* at 192 (citing *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 (1983)).

61. *Id.*

62. *Id.* at 193 (emphasis added) (citing *Herman*, 459 U.S. at 390 (1983) (anti-fraud provision of the Securities Exchange Act); *Grogan v. Garner*, 498 U.S. 279, 291 (1991) (Bankruptcy Code fraud provision)).

63. 17 U.S.C. § 504(c)(2) (2013).

64. *See, e.g., Columbia Pictures Indus., Inc. v. Liberty Cable, Inc.*, 919 F. Supp. 685 (S.D.N.Y. 1996) (explaining that plaintiff must prove willful copyright infringement by a preponderance of the evidence); Ninth Circuit Manual of Model Jury Instructions Civil 17.27 (2007), available at http://www3.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Civil_Jury_Instructions_2014_6.pdf.

65. *Ahern v. Brackney (In re Brackney)*, 2013 Bankr. LEXIS 958, at *2 (Bankr. W.D. Ark. Mar. 14, 2013).

66. *Agilent Techs. v. Kirkland*, 2010 Del. Ch. LEXIS 34, at *67 (Del. Ch. Feb. 18, 2010).

67. Manual of Model Civil Jury Instructions, Eighth Circuit 6.20 (2013), available at http://www.juryinstructions.ca8.uscourts.gov/Manual_Civil_Jury_Inst_FJPI8CIV_2013_ed.pdf.

68. *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1274 (11th Cir. 2008).

69. Ninth Circuit Manual of Model Jury Instructions Civil 11.7B (2007), available at http://www3.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Civil_Jury_Instructions_2014_6.pdf.

E. The Punitive Nature of Treble Damages Does Not Support the Use of the Clear and Convincing Evidence Standard of Proof

Certain decisions post-*Shatterproof* have attempted to support the adoption of a clear and convincing standard on the theory that treble damages are typically awarded only in punitive cases, which require a higher standard of proof.⁷⁰ The Supreme Court has specifically rejected this notion, stating that “[t]here has never been any general common-law rule that the threshold for punitive damages must always be higher than that for compensatory liability.”⁷¹ The Sixth Circuit also rejected this position in *White v. Burlington Northern & Santa Fe Railroad Co.*⁷² As the *White* court observed, the concern that punitive damages will be assessed against the wrong party is addressed by the state of mind required, not the evidentiary standard.⁷³ Just because the law punishes malicious behavior it does not necessarily demand a higher standard of proof to show the existence of that behavior. As for § 284, the Federal Circuit has already addressed the question of the type of behavior that subjects a party to possible treble damages by raising the required showing for willfulness from a standard that was “more akin to negligence” to [objective] recklessness.⁷⁴

F. Statutory Adoption Does Not Support the Clear and Convincing Evidence Standard of Proof

Supreme Court guidance provides another potential reason to deviate from the assumption that preponderance of the evidence is the proper standard under § 284: statutory adoption.⁷⁵ Statutory adoption occurs when Congress, in choosing to use particular language in a

70. See, e.g., *Pall Corp. v. Micron Separations, Inc.*, 66 F.3d 1211, 1221 (Fed. Cir. 1995) (“Thus willful infringement must be established by clear and convincing evidence, for it is a punitive finding, and can have the consequence of multiplication of damages.”) (citations omitted).

71. *Smith v. Wade*, 461 U.S. 30, 53 (1983).

72. 364 F.3d 789, 791 (6th Cir. 2004) (en banc) (“The dissenting opinion states that punitive damages are an unconventional form of relief and therefore deserve a heightened standard of proof. Unquestionably, punitive damages serve a different purpose than compensatory damages. The requirement that punitive damages be awarded only when a defendant acts maliciously or recklessly recognizes this difference in purpose and ensures that punitive damages will be awarded only in the most egregious cases. Punitive damages are not, however, unconventional in the sense that they are a new or nontraditional form of relief. In fact, punitive damages have a long history in American civil litigation, where the traditional standard of proof has been ‘preponderance of the evidence.’”).

73. *Id.*

74. See *In re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (en banc).

75. *Microsoft Corp. v. i4i Ltd. P’ship*, 131 S. Ct. 2238, 2245–46 (2011).

statute, incorporates the established common-law meaning of that language.⁷⁶ This established meaning might imply a higher standard in the common law. The Supreme Court examined this in the context of the standard of proof for invalidating a patent in *Microsoft Corp. v. i4i Ltd. Partnership*.⁷⁷ In that case, Microsoft argued that nothing in the statute required a defendant to invalidate a patent by clear and convincing evidence.⁷⁸ The Court noted that 35 U.S.C. § 282 contained a “presumed validity” of patents and this language was directly adopted from a prior Supreme Court decision that had required a higher standard to invalidate a patent.⁷⁹ By adopting the same “presumed valid” language in the Patent Act of 1952, the Court concluded that Congress must have adopted the common law meaning that patents could only be invalidated upon a showing of clear and convincing evidence.⁸⁰

An examination of § 284 reveals no special language regarding a presumption or the presence of any other legal construct that would indicate that Congress had adopted a common law standard of proof that deviated from the default preponderance of the evidence. The increased damages provision of § 284 merely dictates that the court “may increase the damages up to three times the amount found or assessed.”⁸¹ In fact, § 284 does not mention willful infringement at all, which has led at least one Federal Circuit Judge to argue that the willful infringement requirement was improperly “engraft[ed]” onto § 284 and that the decision to enhance damages should simply be left to the discretion of the district court.⁸² Also, the statute does not contain any language that was adopted by Congress from court cases that required a higher standard of proof in order to obtain treble damages. The purely discretionary nature of the language indicates the opposite, as the Supreme Court similarly concluded in *Octane Fitness* with respect to § 285.⁸³

76. *Id.*

77. *Id.* at 2245–52.

78. *Id.* at 2244.

79. *Id.* at 2245–46.

80. *Id.*

81. 35 U.S.C. § 284 (2013).

82. *Id.*; *In re Seagate Tech., LLC*, 497 F.3d 1360, 1377 (Fed. Cir. 2007) (Gajarsa, J., concurring).

83. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1758 (2014).

IV. SECTION 284 ENHANCED DAMAGES DETERMINATION IS AN ISSUE OF FACT

The Federal Circuit has traditionally treated enhanced damages under § 284 as a two prong issue: first, a determination is made of the factual predicate for enhanced damages, typically willful infringement,⁸⁴ and second, a discretionary determination is made as to the amount, if any, of enhanced damages to be awarded, up to a statutory maximum of three times the original award.⁸⁵ Supreme Court analysis on the awarding of damages in intellectual property infringement cases suggests that both of these prongs, contrary to the current practice, should be determined by a jury.

A. The Factual Predicate of Whether the Infringement was Willful Is a Pure Question of Fact

Historically, courts, including the Federal Circuit, have treated the willfulness determination under § 284 as entirely a question of fact for the jury.⁸⁶ However, the Federal Circuit recently began treating the willfulness determination as a partial question of law for the court as opposed to entirely a question of fact for the jury.⁸⁷ In *Bard Peripheral Vascular v. W.L. Gore & Associates*, while acknowledging that, “[t]he ultimate question of willfulness has long been treated as a question of fact,” the Federal Circuit stated that *Seagate*—which required an objective analysis of whether an infringer acted reasonably in considering willfulness—required a modification to the § 284 analysis.⁸⁸ The *Bard* court noted that this analysis requires an “assessment of potential defenses based on the risk presented by the patent,” which might entail questions of validity that “are not necessarily dependent on the factual circumstances of the particular party accused of infringement.”⁸⁹ The court then cited *Miller v. Fenton* and *Markman v. Westview Instruments, Inc.* for the proposition that sometimes mixed questions of fact and law are treated as a question of law where “[the court] is better positioned to decide the issue in

84. There is some disagreement as to whether a showing of willfulness is necessary for obtaining enhanced damages under § 284, but that is beyond the scope of this article. See, e.g., *Seagate*, 497 F.3d at 1377 (Gajarsa, J., concurring) (stating that the Federal Circuit has erred by limiting enhanced damages to findings of willful infringement).

85. *Seagate*, 497 F.3d at 1368.

86. *Bard Peripheral Vascular, Inc. v. W.L. Gore & Assocs., Inc.*, 682 F.3d 1003, 1004–06 (Fed. Cir. 2012).

87. *Id.*

88. *Id.*

89. *Id.*

question.”⁹⁰ The *Bard* court concluded that willfulness should be treated as a two-part analysis, the first part of which may be a question of law to be handled by the judge, because “the court is in the best position for making the determination of reasonableness even . . . though predicated on underlying mixed questions of law and fact.”⁹¹

1. The *Bard* Court Failed to Engage in the Necessary Seventh Amendment Analysis

While the *Bard* court cited *Markman* as support for its holding that mixed questions of fact and law are sometimes appropriate for the judge, it failed to engage in the Seventh Amendment analysis conducted in *Markman*. First, one must inquire whether there was a common law right to have a jury decide the issue that existed prior to the Seventh Amendment, which was passed in 1791.⁹² A review of pre-Seventh Amendment law does not reveal whether a jury was expected to determine if patent infringement was willful.⁹³ However, an examination of willful infringement decisions after 1791 shows that there has never been even a mild debate about who should decide willfulness.⁹⁴ It has always been a question of fact for the jury. Additionally, because willful infringement is merely a type of infringement, one would expect that a jury would determine this issue.⁹⁵ That the issue of willfulness in patent infringement litigation directly relates to the damages awarded makes it even more likely to fall under the purview of the jury. As discussed by the Supreme Court in *Feltner v. Columbia Pictures Television, Inc.*, “there is overwhelming evidence that the consistent practice at common law [prior to 1791] was for juries to award damages.”⁹⁶

90. *Id.* (citing *Miller v. Fenton*, 474 U.S. 104, 113–14 (1985)); *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 388 (1996)).

91. *Id.* at 1006–07.

92. *Markman*, 517 U.S. at 376.

93. See, e.g., Janice M. Mueller, *Commentary: Willful Patent Infringement and the Federal Circuit’s Pending En Banc Decision in Knorr-Bremse v. Dana Corp.*, 3 J. MARSHALL REV. INTELL. PROP. L. 218, 224 (2004) (reviewing pre-1791 patent law including all the patent cases cited in *Markman* and finding no mention of a jury being asked to determine if infringement was willful).

94. See, e.g., *Studiengesellschaft Kohle m.b.H. v. Dart Indus., Inc.*, 862 F.2d 1564, 1573 (Fed. Cir. 1988); *State Indus., Inc. v. Mor-Flo Indus., Inc.*, 883 F.2d 1573, 1581 (Fed. Cir. 1989); *Hammerquist v. Clarke’s Sheet Metal, Inc.*, 658 F.2d 1319, 1325–26 (9th Cir. 1981) (commenting that “willful infringement involves a mental state peculiarly within the realm of jury judgment”).

95. *Markman*, 517 U.S. at 377 (“[T]here is no dispute that infringement cases today must be tried to a jury, as their predecessors were more than two centuries ago.”).

96. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353–54 (1998).

Because there is no direct corollary to pre-1791 patent law, which lacks an analogous willfulness provision, a review of the closest 18th-century analogue is the next step,⁹⁷ which in this case appears to be willful copyright infringement.⁹⁸ In *Feltner v. Columbia Pictures*, the Supreme Court examined whether “the Seventh Amendment grants a right to a jury trial when a copyright owner elects to recover statutory damages.”⁹⁹ This case dealt with damages that were awarded upon a finding of “willful infringement.”¹⁰⁰ After engaging in exactly the same analysis it performed in *Markman*, the Court found that “the Seventh Amendment provides a right to a jury trial on *all* issues pertinent to an award of statutory damages under § 504(c) of the Copyright Act, including the amount itself.”¹⁰¹ Critically, this holding was based on the Court’s finding that there was a common law, pre-Seventh Amendment right to have a jury determine and set damages in a copyright dispute.¹⁰² Such a finding suggests that the factfinder should also be the entity responsible for determining whether patent infringement is willful. This would be consistent with willfulness determinations in other areas of law.¹⁰³

Bard’s holding also goes directly against a long tradition of leaving questions of reasonableness to the factfinder. The Supreme Court has observed that reasonableness is ultimately a question of fact by recognizing the “jury’s unique competence in applying the ‘reasonable man’ standard.”¹⁰⁴ The Federal Circuit has also recognized the role the jury has in determining whether an infringer had a reasonable belief that accused activity did not violate the law.¹⁰⁵

97. *Markman*, 517 U.S. at 379–80.

98. *See, e.g.*, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 US 417 (1984) (looking to patent law where there was no precedent in the copyright law “because of the historic kinship between patent law and copyright law”); *In re Seagate Tech., LLC*, 497 F.3d 1360, 1370 (Fed. Cir. 2007) (en banc) (looking to willful infringement in the copyright context in an effort to understand the proper application of willful infringement in the patent context).

99. *Feltner*, 523 U.S. at 342.

100. *Id.* at 345–46.

101. *Id.* at 355 (emphasis added).

102. *Id.* at 349–55.

103. *See, e.g.*, *Yurman Design, Inc. v. PAJ, Inc.*, 93 F. Supp. 2d 449, 461–62 (S.D.N.Y. 2000) (affirming a jury’s finding of willfulness in a trade dress infringement suit); *Segrets, Inc. v. Gillman Knitwear Co., Inc.*, 207 F.3d 56, 66 (1st Cir. 2000), *cert. denied*, 531 U.S. 827 (2000) (remanding the issue of willfulness in a copyright case so that a jury could determine it).

104. *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 450 n.12 (1976).

105. *See Nat’l Presto Indus., Inc. v. W. Bend Co.*, 76 F.3d 1185, 1193 (Fed. Cir. 1996) (“Whether the infringer had a reasonable belief that the accused activity did not violate the law is a question of fact, as are other questions relevant to the issue of willfulness.”) (citations omitted); *see also Rand v. Underwriters at Lloyd’s*, 295 F.2d 342, 346 (2d Cir. 1961) (emphasizing that

To justify its departure from longstanding tradition, *Bard* cites to previous findings by the Federal Circuit that the objective prong applied in § 284 is the same as the one applied in § 285 and that § 285 “must be interpreted against the background of the Supreme Court’s decision in [*PRE*].”¹⁰⁶ In *PRE*, the court analogized “sham litigation” to “a lack of probable cause to institute an unsuccessful civil lawsuit.”¹⁰⁷ The *Bard* court took this one step further by observing that in the criminal context the Supreme Court has held that “probable cause” is subject to *de novo* review even though it deals with questions of both fact and law.¹⁰⁸

As discussed above, the Supreme Court held in *Octane* that the analytical framework of *PRE* is not applicable to § 285.¹⁰⁹ This finding undermines *Bard*’s belief that *PRE*’s connection to § 285 supports its holding with respect to § 284. Moreover, the Court’s *Highmark* decision, which found that “the § 285 inquiry . . . is, at heart, rooted in factual determinations,”¹¹⁰ in no way supports *Bard*’s suggestion that willfulness is a partial legal question for the court. The *Bard* court fails to provide a sufficient basis for changing what “has long been treated as a question of fact”¹¹¹ to a question of law simply because the standard has increased from negligence to recklessness.

B. The Discretionary Award of Enhanced Damages Is an Issue for the Jury

The determination, upon a finding of willful patent infringement, of whether to enhance damages and in what amount is currently viewed as a task for the judge.¹¹² At first glance, this appears to be consistent with the statute that provides “the court may increase the damages up to three times the amount found or assessed.”¹¹³ However, a similar analysis as the one done for the first prong of the enhanced damages test under § 284 suggests that this discretionary determination is also a task for the jury. Specifically, the Supreme Court in *Feltner* considered

“when dissimilar inferences may be drawn from undisputed facts, or when the facts are in dispute, ‘reasonableness’ is a jury question”).

106. *Bard Peripheral Vascular, Inc. v. WL Gore & Assocs.*, 682 F.3d 1003, 1007 (Fed. Cir. 2012) (citing *iLOR, LLC v. Google, Inc.*, 631 F.3d 1372, 1377 (Fed. Cir. 2011)).

107. *Prof’l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 62–63 (1993).

108. *Bard*, 682 F.3d at 1008 (citing *Ornelas v. United States*, 517 U.S. 690, 697–98 (1996)).

109. *Octane*, 134 S. Ct. at 1757.

110. *Highmark*, 134 S. Ct. at 1749.

111. *Bard*, 682 F.3d at 1006.

112. *In re Seagate Tech., LLC*, 497 F.3d 1360, 1368 (Fed. Cir. 2007) (en banc).

113. 35 U.S.C. § 284 (2013) (emphasis added).

whether there was a Seventh Amendment right to have a jury determine copyright statutory damages, which included potential enhancement for willful infringement.¹¹⁴ The relevant copyright statute contained similar language to § 284 stating “[i]n a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages.”¹¹⁵ The Supreme Court found “[t]he word ‘court’ in this context appears to mean judge, not jury.”¹¹⁶ The Supreme Court thus held that it “discern[ed] no statutory right to a jury trial when a copyright owner elects to recover statutory damages. Accordingly, we must reach the constitutional question.”¹¹⁷

The Court then went through the historical analysis described above and concluded that there was a constitutional right to a jury on the question. Specifically, the court found that before 1791 damages in intellectual property cases were set by a jury.¹¹⁸ This fact led the *Feltner* court to conclude that even though the statute on willful copyright infringement directs the “court” to determine the amount of damages to award the plaintiff, under the Seventh Amendment there is a constitutional right to have the jury make this determination.¹¹⁹

Despite the fact that § 504(c) of the Copyright Act,¹²⁰ as written, appeared to be unconstitutional, it was not stricken. Rather, it has merely been interpreted with the judicial gloss that, despite its actual text, there is a right to have a jury determine the statutory damages.¹²¹ In rejecting the argument that statutory copyright damages were no longer available because the Supreme Court had struck the statute as unconstitutional in *Feltner*, the Ninth Circuit held:

According to *Feltner*, if the Court finds that § 504(c) [of the Copyright Act] is constitutionally infirm because it fails to provide for a jury trial, then the Court must strike down § 504(c) in its entirety and wait for Congress to re-enact § 504(c) with a jury trial provision included. This argument fails to understand the Supreme Court's holding in this case. In *Feltner*, the Supreme Court held that

114. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 347–53 (1998).

115. *Id.* at 343–44.

116. *Id.* at 346.

117. *Id.* at 347.

118. *Id.* at 351–53.

119. *Id.* at 353–56 (“The right to a jury trial includes the right to have a jury determine the amount of statutory damages, if any, awarded to the copyright owner.”) (emphasis in original).

120. 17 U.S.C. § 504(c) (2013).

121. *See, e.g., Columbia Pictures Indus., Inc. v. Krypton Broad., Inc.*, 259 F.3d 1186 (9th Cir. 2001) (the appeal following the remand to the trial court for a jury trial on damages following the Supreme Court's *Feltner* decision).

§ 504(c) provides a remedy for copyright infringement, and the Seventh Amendment provides a right to a jury trial when that remedy is at issue.¹²²

Given the strong historical and statutory correlation between patent and copyright law, the Supreme Court's analysis in *Feltner* does not leave a lot of room for a different conclusion as it relates to the discretionary determination of the damage amount under § 284.¹²³ Accordingly, the entire § 284 inquiry is likely a matter for the jury. Moreover, § 284 should not be struck, but simply interpreted to preserve the right to a jury, as has been done post-*Feltner*.

V. THE IMPLICATIONS OF LOWERING THE EVIDENTIARY STANDARD FOR WILLFULNESS AND PUTTING THE RELATED DISCRETIONARY QUESTIONS IN THE HANDS OF THE JURY

Lowering the evidentiary standard from clear and convincing to a preponderance of the evidence has the obvious effect—all else being equal—of making it more likely that a patent holder will be able to make a willfulness showing. Allowing juries instead of judges to decide whether to award enhanced damages and, if so, the amount has other implications. The most significant potential impacts fall under two main categories: (1) the change in litigation tactics used to defend against claims of willful infringement and (2) the change in the expected outcome of these pursuits.

A. *The Potential Change in Litigation Tactics*

Litigation tactics are likely to change if juries decide the question of enhanced damages under § 284. This is due to the fact that the defendant's litigation conduct has historically been considered in setting such damages. *Read v. Portec* set out nine factors to be considered, including “the infringer's behavior in the litigation.”¹²⁴ If

122. *Id.* at 1192.

123. One alternative to viewing § 284, as it is currently written, as unconstitutional is to read “court” as referring to the jury, a route Justice Scalia chose to take. *See Feltner*, 523 U.S. at 356 (Scalia, J., concurring).

124. The other *Read* factors include:

(1) whether the infringer deliberately copied the ideas or design of another; (2) whether the infringer, when he knew of the other's patent, investigated the patent and formed a good faith belief that it was invalid or that it was not infringed; (3) the infringer's size and financial condition; (4) the closeness of the case; (5) the duration of the misconduct; (6) the remedial action by the infringer; (7) the infringer's motivation for harm; and (8) whether the infringer attempted to conceal its misconduct.

defendants know that a jury will be considering their litigation behavior in the context of enhanced damages they will likely shift their behavior. Judges, unlike juries, are likely immunized to a certain extent by some of the more abusive litigation tactics that parties use. Defendants may curb the common practice of asserting every conceivable defense and position pre-trial only to dramatically narrow their case at trial to a small subset of these issues. For example, it is common for defendants to assert dozens if not hundreds of prior art references pre-trial, but only assert one to three of them at trial. It may be more difficult for an infringer to explain to a jury that it truly believed the patent was invalid or not infringed after abandoning dozens of “defenses” pre-trial. This concern may make bifurcation of willfulness more likely as well.

Another possible shift in behavior relates to a second *Read* factor: “whether the infringer, when he knew of the other’s patent, investigated the patent and formed a good-faith belief that it was invalid or that it was not infringed.”¹²⁵ While judges routinely apply *Knorr-Bremse*, which removed the adverse inference that a legal opinion on infringement would have been unfavorable if an attorney was not consulted as to infringement,¹²⁶ parties may believe that a jury might be less capable of engaging in such a legal fiction. Defendants thus might be more inclined to present evidence of consultation with outside counsel to a jury—risking potential waiver—than if a judge was the decision maker.

Finally, defendants might curtail or modify their behavior during litigation because of the perception that juries are more likely to utilize punitive measures and implement these measures to a greater degree.¹²⁷ This might motivate defendants to try harder to establish they were the more reasonable party in the litigation and need not be punished. This raises another question: how will an increased reliance on juries impact the outcome of disputes over willful infringement and enhanced damages?

Spectralytics, Inc. v. Cordis Corp., 649 F.3d 1336, 1348 (Fed. Cir. 2011) (summarizing the factors found in *Read Corp. v. Portec, Inc.*, 970 F.2d 816, 826–27 (Fed. Cir. 1992)).

125. *Id.*

126. *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337, 1347 (Fed. Cir. 2004); *see also* 35 U.S.C. § 298 (2013).

127. *See, e.g.,* Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. LEGAL STUD. 1, 2 (2004).

B. Potential Changes as to the Likelihood and Size of Enhanced Damages

Relying on a jury instead of a judge for determining enhanced damages has the potential to change the likelihood of a decision to award damages and, if so, the size of such an award. An empirical study published in 2012 showed that prior to *In re Seagate*, which added the “evidence that infringer acted despite an objectively high likelihood that its action constituted infringement” test to a finding of willfulness,¹²⁸ judges and juries both found willful infringement at roughly equal rates (54% and 61%, respectively).¹²⁹ However, in the years after *Seagate*, jury findings of willfulness remained at about the same rate (62%), while judicial findings of willfulness plummeted to less than 19%.¹³⁰ While the sample size was not tremendous—there were only 111 post-*Seagate* determinations of willfulness in the study, only a small portion of which were judicial findings¹³¹—the difference may be statistically significant in suggesting that increased reliance on juries will result in more findings of willful infringement. However, part of the shift in willfulness findings is due to an increase in summary judgment findings as to willfulness, as well as JMOL findings of no willfulness.¹³² As such, some of the recently observed reduction in willfulness allegations ultimately resulting in an award of treble damages at trial would remain even if the jury’s role in the process was increased.¹³³

As to the size of a potential § 284 award, there is some evidence that juries are more likely to award punitive damages and also more likely to award such damages at the higher end of the allowable scale.¹³⁴ To that end, putting willfulness and enhanced damages findings in the hands of the jury will likely result in an increase in damages being awarded at the upper end of the allowable scale. However, unlike the copyright act, which provides little guidance on the amount of statutory damages for willful infringement (which under § 504(c) range from

128. *In re Seagate, LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (en banc).

129. Christopher B. Seaman, *Willful Patent Infringement & Enhanced Damages After In Re Seagate: An Empirical Study*, 97 IOWA L. REV. 417, 445 (2012). Note that this data only looked at decisions at the district court level, however it includes final determinations under all procedural postures except default judgment.

130. *Id.*

131. *Id.*

132. *Id.*

133. *See id.* at 440.

134. *See, e.g., Hersch & Viscusi, supra* note 127 (finding that most \$100+ million punitive awards are the result of jury trials).

\$750–\$150,000 per act—or 200 times the base amount), there is a well-established jurisprudence for determining patent damages that are rationally connected to the infringing activity and a willfulness finding can result in no more than a trebling of that amount.

CONCLUSION

The Federal Circuit’s jurisprudence regarding 35 U.S.C. § 284 likely needs to be revisited, as recognized by at least two Federal Circuit judges.¹³⁵ For at least the first 170 years after Congress provided discretion, judges did not require clear and convincing evidence to obtain treble damages for patent infringement. Additionally, the various statutes relating to this provision have never mentioned or called for this evidentiary standard. Further, the language Congress selected when drafting § 284 does not indicate an intent to adopt a common-law standard that exceeds the preponderance of the evidence.

The Federal Circuit’s adoption of “clear and convincing evidence” for § 284 goes against the Supreme Court’s repetitions over the last forty years that civil litigation, even in the context of punitive remedies, should be governed by the preponderance of the evidence unless a governing statute requires otherwise. The proper standard of proof for § 284 is likely the preponderance of the evidence.

Similarly, the Federal Circuit’s recent holding in *Bard*, that the objective prong of a willfulness determination under § 284 is a question of law for the court subject to *de novo* review,¹³⁶ should likely be reconsidered. The *Bard* court failed to justify its deviation from the long practice of treating willfulness as an issue of fact for the jury to resolve. Its statement that the judge is best suited to determine the objective reasonableness of the behavior of accused infringers, even when this determination is based on mixed questions of fact and law, is opposed by the longstanding American practice of putting that determination in the hands of the factfinder. The *Bard* court’s reliance on § 285 and *PRE* as justification for its holding is now likely unsupported in light of the Supreme Court’s recent opinions in *Highmark* and *Octane*.

Moreover, the Supreme Court’s analysis in *Feltner* on the award of statutory damages for willful copyright infringement suggests that not only should the factual predicate of willfulness be determined by a

135. Judge Hughes joined Judge O’Malley’s concurrence in *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 769 F.3d 1371, 1383–86 (Fed. Cir. 2014).

136. *Bard Peripheral Vascular, Inc. v. W.L. Gore & Assocs.*, 682 F.3d 1003, 1004–06 (Fed. Cir. 2012).

jury, but also that the decision of whether to award enhanced damages, and if so, the amount, is a task for the jury.

Finally, there are several implications if these suggested changes to § 284 jurisprudence are adopted. A lowered standard of proof would likely increase willfulness findings, but it remains to be seen if this increase would offset the increased summary judgment findings and successful JMOLs dismissing willfulness that have taken place post-*Seagate*. Similarly, a shift to relying on juries for enhanced damages determinations may also increase the likelihood of a willfulness finding, as well as the size of the damages awarded. Another possible effect is a decrease in abusive pre-trial tactics by defendants, for fear of the jury learning of them. Defendants might also be more willing to present evidence of a reliance on the advice of counsel to a jury, despite the jurisprudence dictating that this no longer creates an adverse inference. Fear of increased damages as set by a jury may incentivize defendants to make a greater effort to appear as the reasonable party who does not merit punishment.